



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 8, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-1187

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114107.

The Texas Department of Health (the "department") received a request for the "report of contact and statement of deficiencies" pertaining to Samaritan Home Health, a home and community support services agency licensed by the department. You assert that some of the requested information is excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with various statutory provisions and common-law privacy.

Section 552.101 of the Government Code excepts from disclosure information that is deemed confidential, including information that is made confidential by statute. You raise section 142.009(d) of the Health and Safety Code regarding a group of documents submitted for our review. Health and Safety Code section 142.009(c) authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

- (1) to a state or federal agency;

- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.

We have reviewed the document for which you assert section 142.009(d) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. We have no reason to believe that any of the exceptions to confidentiality in section 142.009(d) apply in this instance to the requested "Report of Contact." We therefore conclude that the department must withhold this document from the requestor in its entirety.

On the other hand, you have submitted to this office a "state form" contemplated by section 142.009(d)(5). Although this form does not contain information that identifies any individual other than the administrator of the health agency under investigation, the form does contain information otherwise deemed confidential by statutory law. The Texas Medical Practice Act, V.T.C.S. article 4495b provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.


V.T.C.S. art. 4495b, § 5.08(b). We have marked the information obtained from medical records that the department must withhold pursuant to article 4495b. The remaining portions of this document must be released.

We note that several of the documents submitted to this office consist of statements of deficiencies and plans of correction reports (the "reports") for Samaritan Home Health that were prepared for purposes of a Medicare or Medicaid complaint investigation survey. In accordance with federal regulations, the department must release these records in their entirety provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to

offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988).¹ Because the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the reports, we conclude the provider has had a reasonable opportunity to review and comment on the report. Accordingly, the department must release these reports, but with deletions of information that identify the persons specified in the regulations.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/RWP/ch

Ref.: ID# 114107

Enclosures: Submitted documents

cc: Ms. Sal'An Hixson
8351 Bearcreek Road
Aledo, Texas 76008
(w/o enclosures)

¹You claim that common-law privacy and various confidentiality provisions apply to certain information that you have marked in the reports. As we conclude that federal law requires you to release de-identified copies of these reports, we do not address your arguments regarding the confidentiality of the reports under these provisions. *See* Open Records Decision No. 487 (1988).